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No. 001939 JUN 25 2001

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In The Supreme Court of the United States

ANTONE HENRY POINDEXTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. **FIRST QUESTION PRESENTED**

The issue presented in this appeal presents an important question as to how under Federal Law and the 6th Amendment of the Constitution a trial court should grant a defendant and his attorney's Motion for New Counsel.

II. **SECOND QUESTION PRESENTED**

The issue presented in this appeal presents an important question as to how under Federal Law and the 6th Amendment of the Constitution a trial court should grant a defendant's claim of ineffective assistance of counsel on direct appeal.

III. **THIRD QUESTION PRESENTED**

The issue in this appeal presents an important question as to how under Federal Law a trial court determines a violation of the defendant's Due Process Constitutional Rights.

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RECORD NO. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

****

ANTONE HENRY POINDEXTER,

Petitioner,

V.

UNTIED STATES OF AMERICA,

Respondent.

****

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit.

****

Petitioner Antone Poindexter, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is unpublished and appears in Appendix A to this Petition. The Order of the United States District Court for the Eastern District of Virginia, Richmond Division, is also unreported and appears in Appendix B to this Petition.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit was entered on March 26, 2001. This Petition for a Writ of Certiorari is filed within ninety (90) days of that date. The Court's jurisdiction is invoked under Title 28 U. S. C. Sect. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Constitutional and Statutory Provisions are involved in this case: the 6 th and 14 th Amendment, United States Constitution, 18 U.S.C. Sec. 922(a)(6) & 924(a)(1)(A), 18 U.S.C. Sec. 922(g)(1) & 924, 18 U.S.C. 922(a)(6) & 18.2.

STATEMENT OF THE CASE

Mr. Poindexter, (herein after "Poindexter"), was indicted by the Federal Grand Jury on February 21, 1997. The offenses in the Nine Count Indictment were: Count One, conspiracy to defraud the United States (18 USC Sec. 922(a)(6) & 924(a)(1)(A)), Counts Two-Five, possession of a firearm by a convicted felon (18 USC Sec. 922 (g)(1) & 924), Counts Six-Nine, false statement to a firearms dealer (18 USC Sec. 922(a)(6) & 18.2). August 8, 1997 of one count of possession of a firearm after being convicted of a felony. (J.A. 9). The case was set for a trial by jury on the date of May 2, 2000. The jury found Poindexter guilty of all nine

counts of the indictment. The Honorable Judge James C. Cacheris subsequently sentenced Mr. Poindexter on July 10, 2000. Poindexter was sentenced to the following: Count One, 60 months to run concurrently with Counts Two through Nine, Counts Two-Five, 235 months on each Count to run concurrently, Counts Six-Nine, 120 months on each count to run concurrently.

Petitioner timely filed his Notice of Appeal to the Fourth Circuit Court of Appeals. Petitioner's convictions and sentence was affirmed by an Unpublished Per Curiam Opinion on March 26, 2001. Petitioner thereafter filed this Petition for Writ of Certiorari.

STATEMENT OF THE FACTS

The Mr. Poindexter was said to have, with four co-conspirators, acquired four firearms through the use of "straw purchasers" who were to obtain the firearms for Mr. Poindexter. Mr. Poindexter was a convicted felon. The co-conspirators that were said to have purchased the firearms for Mr. Poindexter did not have felony criminal records and thus were able to purchase the firearms for Mr. Poindexter. Furthermore, the Government produced four witnesses to testify against Mr. Poindexter and numerous documents in their case against Mr. Poindexter during the trial. The four witnesses stated that they had obtained the firearms and provided them to Mr. Poindexter for payments by him to them for getting him the firearms. All four witnesses stated at trial that they had made false statements on the firearm applications in order to purchase the weapons.

The defendant prepared and filed with the Court a Motion for New Counsel, which was received by the Court one week before the trial date. The defendant alleged in his Motion that his current court appointed counsel, Mr. Stanley Preston, was ineffective in assisting him in preparing for trial. The Court heard the Motion for New Counsel moments before the start of the jury trial. The defendant and attorney, Mr. Preston were present and both presented evidence to the Court in regard to this Motion. The Court

after hearing the evidence denied the defendant's Motion for a new attorney.

The trial judge in denying both parties Motions concluded the following:

> "The defendant is entitled to a free lawyer. He doesn't have to like his lawyer or like the advice that he is giving him. And I find on the basis of this that there's no basis to file the motion for termination of counsel. And I would deny the motion also for leave to withdraw. As difficult as it is, it appears they have a problem communicating, but the defendant is entitled to a free lawyer, not one that he necessarily gets along with or likes the advice that he gives him. Apparently the defendant hasn't cooperated since on or about April 21, 2000, with his lawyer. So accordingly, I find no basis to grant either motions. You can raise this, if you are convicted in this case, on appeal for ineffective assistance of counsel, Mr. Poindexter. Okay. We'll just have to go ahead and proceed with it. I understand your points. Thank you. The trial judge further stated "I understand. I am not going to give you another lawyer. That's where it's at. You get another lawyer for appeal if you're convicted. You are not going to get another lawyer now."

The defendant stated to the Court that he and Mr. Preston had irreconcilable differences that could not be resolved and that these differences would affect his ability to have a fair trial. The defendant complained that Mr. Preston had only met with him three times prior to the date of the trial in his efforts to prepare for the jury trial. The defendant further alleged that he had not received in full, from his attorney, all the evidence that was to be used against him at trial by the government and that he had only received his own statements the night before the trial in the mail from Mr. Preston. Poindexter stated to the Court that "I'm just finding out just now there's a gun." The defendant further stated "he and Mr. Preston were arguing so much

that they never got to it, we never got to --- actually to my witnesses." Furthermore, the defendant claimed, and which it was uncontradicted, that he and his attorney "never discussed exactly how much time he was facing." The defendant alleged that his trial witnesses not been interviewed or subpoenaed. To bolster his allegation the defendant stated that he does "have witnesses, he hasn't taken his time to get up with them. Last week he recommended I either hang myself or just disappear in the facility to avoid the trial. I'm not trying to avoid trial." The trial judge simply stated that he "understood." The trial court, at this point, inquired into the defendant's allegations that he had witnesses and that they had not been interviewed or subpoenaed. The defendant and attorney agreed that they had attempted to contact and had contacted witnesses for the bond hearing. However, the defendant stated that he and Mr. Preston were in such conflict that "we never got to it, we never go to it - - - actually to my witnesses" for trial. The defendant further stated, "that is how much we weren't communicating, we were practically arguing the whole time." Thus, the defendant had no defense witnesses at the trial.

Mr. Preston filed with the Court his request for a Motion to Withdraw as counsel for Mr. Poindexter. The Court timely heard the Motion prior to the jury trial and subsequently DENIED the Motion to Withdraw. Mr. Preston in his Motion stated that Mr. Poindexter had not been able to assist him in preparation for the trial since the date of April 21, 2000. Mr. Preston stated that Poindexter *"as of a week and a half to almost two weeks ago, he shut down, and as far as a proper defense, I'm at wit's end."* Mr. Preston stated that Poindexter "had stopped cooperating to the point where he would not even indicate to me whether he was going to testify today or not." Finally, Mr. Preston continued to state that their relationship had degraded to such a degree that he "refused to discuss" the case.

The parties both renewed their Motions prior to the sentencing hearing and again they were DENIED.

The defendant also alleged in his Motions that Mr. Preston failed to file various Motions that he felt would be beneficial to his case. The defendant subsequently filed the Motions that he felt appropriate. They were decided by the Court without a hearing and on the written Motions prior to his sentencing hearing. Those Motions filed were the Motion to Dismiss for Lack of Jurisdiction, violation of his Speedy trial rights and Delay in Bringing the Defendant to Trial, Ineffective assistance of counsel and a Motion for New Trial based on discovery of New Evidence. The defendant filed the above listed Motions pro se without the assistance of counsel. The Motions were DENIED by the Court, initially, without oral argument and without the opportunity to offer additional evidence, however, at sentencing the Court did permit additional evidence to be offered by the Parties in regard to the Motions.

The next Motion was the Defendant's Request for New Trial based upon the discovery of New Evidence. The defendant stated, prior to the start of trial, he was informed that the prosecution had a firearm that they alleged that he had purchased with the other parties that would be used against him at trial. The defendant stated that that was the first time that he had been advised of this evidence and that the firearm would be used against him during the trial. The defendant stated that his attorney never advised him that they had a firearm. The defense attorney stated that he, himself, had no knowledge that the prosecution had a firearm to use against the defendant at trial. The defendant concluded that this was "new evidence" since it was the first time that he or his attorney had knowledge of the evidence. The Court in this ruling stated that the "new" evidence in question was not "new" but was available to the defense and had been made available to the defendant personally through various documents obtained during Discovery.

The defendant's Motion for violation of Speedy Trial and the Motion for Lack of Jurisdiction were essentially one in the same in that they alleged violation of the defendant's Speedy Trial rights and in addition the violation of his Due

Process Rights. The court denied the defendant's Speedy Trial argument as not being timely. The defendant filed this Motion prior to the sentencing hearing and the court stated that he waived his right to Speedy trial as he failed to make the motion prior to trial as required by law.

The Due Process rights of the defendant were violated, the defendant alleged, due to the fact that a considerable amount of time had elapsed from the time of the alleged criminal acts to the time of his trial. The time that had elapsed was over seven years. The criminal acts were to have occurred in late 1993 and early 1994, the Federal Grand Jury Indictment occurred in February 1997and his trial occurred in May of 2000. The defendant argued personally that these rights had been violated. Special Agent John Healy of the A. T. F. had been investigating this alleged crime since February 1994 and had been in contact with an alleged cooperating co-conspirator, Mark Thompson since that time. Agent Healy never lost contact with Mr. Thompson throughout this period of time. The trial judge did not inquire as to why such an unreasonable delay occurred nor did he seek an explanation from the A. T. F. agent or the prosecutor. The defendant argued in his Motion that such a lengthy delay was clearly unreasonable and that it was prejudicial to his case.

ARGUMENTS FOR ALLOWANCE OF THE WRIT

FIRST ISSUE PRESENTED

I. The issue presented in this appeal presents an important question as to how under Federal Law and the 6th Amendment to the Constitution a trial court should grant a defendant and his attorney's Motion for New Counsel ?

The defendant and attorney filed their motions in a timely manner. The defendant filed the Motion for a new attorney and the defense attorney filed his motion to withdraw prior to the jury trial. The court chose to hear both

motions immediately prior to the trial and subsequently denied the Parties Motions.

The fairness to be achieved for the defendant is not just the opportunity to have a trial but also give him the opportunity to make an intelligent decision after viewing all the evidence as to whether or not he should have a trial or plead guilty. It was abundantly clear that the defendant not only was unprepared for a jury trial but that he also lacked the knowledge as to whether or not he should plead guilty and not take a jury trial.

The court in U. S. v. Mullen set forth the above test to determine whether or not a new attorney should have been appointed for the defendant. The parties appeared to have filed their motions timely as the trial court nor the prosecution contested the timeliness of the filings. The second prong of the test was in regard to the adequacy of the court's inquiry. The inquiry by the court proved to be adequate as the information outlined by the parties was clearly straightforward and the parties essentially agreed to the statements of each other.

The final prong of the test is in determining whether the attorney/client conflict was so great that it resulted in a total lack of communication preventing an adequate defense. It was obvious from the motions of both the defendant and the attorney that there had been no preparation by either party for this trial and that it was not justifiable in making the parties go forward. Generally speaking, the reported fact that the defendant and counsel are not "getting along" is insufficient to require appointment of substitute counsel. Morris v. Slappy, 461 U. S. 1, (1983). The fact that these parties did not get along is an understatement. These parties not only didn't get along their relationship went sour so fast that they never were able to prepare for the trial. This court in United States v. Burns, 990 F.2d 1426, (4th Cir. 1994), held that the Sixth Amendment does not guarantee a "meaningful relationship" or good rapport with an attorney, just a constitutionally adequate representation. Although the parties in the present case did

not have a good relationship the hostility between the two prevented the defendant from preparing for his trial and having adequate representation to assist him in this preparation.

In conclusion, the trial court erred when it did not appoint new counsel under the circumstances presented to the judge during the arguing of the motions by the defendant and his attorney at either the trial or the sentencing hearing. The defendant had the constitutional right to have adequate representation to present this evidence to him and assist him in his decision making process in regard to the trial. The defendant lacked this critical trial element as he simply, for all purposes, prepared his own case based upon the limited knowledge of the evidence that he had or that had been made available to him by his attorney.

SECOND ISSUE PRESENTED

II. The issue presented in this appeal presents an important question as to how under Federal Law and the 6th Amendment to the Constitution a trial court should grant a defendant's claim of Ineffective Assistance of Counsel on direct appeal ?

ARGUMENT

The court, upon receiving the motion denied the said motion prior to the sentencing hearing based upon the evidence set forth in the motion. The trial court erred when it stated in its Order that this issue could not be raised at the trial level. The trial court stated in its Order that the motion was not procedurally correct in that it could not be raised at this point of the trial and that is should be brought by a 28 U. S. C. Sec. 2255 petition or after petitioner has appealed the underlying conviction or upon the petitioner's waiver of right to appeal. (Ap. 208).

The above ruling in United States v. Martinez, permits such a motion to be made and argued while the

parties are still at the trial level stating that the matter could be heard on direct appeal if and only if it conclusively appears from the record that his counsel did not provide effective assistance of counsel. The court established in Strickland v. Washington, 466 U. S. 668 (1984); the benchmark in determining whether assistance of counsel has been constitutionally adequate. The two prong test that must be followed is set forth and states, (1) the defendant must show that the counsel's representation fell below "an objective standard of reasonableness" and, (2) the defendant must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different.

In regard to the first prong, in making this determination, there is a strong presumption that counsel's conduct was within the wide range or reasonable professional assistance. In regard to the second prong, the defendant must prove a reasonable probability of a different outcome and it must be sufficient to undermine confidence in the outcome of the court proceeding.

The court must first analyze the actions or inactions of the defendant's attorney at the trial level. They include the above uncontradicted facts listed in the Statement of the Case by the defendant.

The defendant also noted above the Motions that his attorney failed to file where as the defendant filed the Motions pro se on his own behalf. The defendant filed his own motion in regard to the fact that his Due Process rights had been violated due to the fact that the Government had created a seven-year delay in bringing the defendant to trial. A motion for dismissal based upon violation of his Due Process rights appears to be a legal and valid defense that should have been raised prior to the trial and by the attorney.

Thus, the trial court, upon hearing the above evidence should have granted the defendant's motion for ineffective assistance of counsel and appointed a new attorney.

THIRD ISSUE PRESENTED

III. The issue in this appeal presents an important question as to how under Federal Law a trial court determines a violation of the defendant's Due Process Constitutional rights?

ARGUMENT

The defendant contended in his pro se motion that his Due Process rights were violated by the Government. The defendant alleges that these rights were violated due to the length of time that had elapsed from the time of the offenses until the date of his trial. The criminal acts committed by the defendant were said to have began in August of 1993 and continued up to the month of February 1994. The defendant was not served the Indictment until the month of December 1998.

The delay did cause extreme prejudice to the defendant's ability to have a fair trial as a critical witness for the defendant named "Jasper" had been accidentally killed during the lengthy time period that had elapsed before he was served with his Indictments and brought to trial. The defendant further went on to state to the trial judge at the sentencing hearing that he also had additional witnesses that he could produce at trial but that he was unsure of their current addresses. Although the defendant did not state that he would be unable to find the witnesses he simply stated that at the present time he did not know their whereabouts and that he or his attorney did not have the opportunity to locate them in time for the trial. The trial judge took this statement by the defendant to mean that the witnesses were unavailable for the trial although that is not what the defendant had stated. Even if the witnesses were unavailable for the trial due to their whereabouts being unknown it was because of the Governments seven year delay in bringing the defendant to trial which caused the

defendant to lose contact with individuals that he may not have seen since 1993 and 1994.

This court has held in Howell v. Barker, 904 F.2d 889, (4th Cir. 1990), it is a case by case analysis as to whether or not a pre-indictment delay violates the Due Process Clause. The Supreme Court held in United States v. Lovasco, 431 U. S. 783, (1977), that "a pre-indictment delay will only constitute a reversible error when the delay violates the "fundamental conceptions of justice which lie at the base of our civil and political institutions... and which defy the community's sense of fair play and decency," and the defendant has suffered actual prejudice.

The court not only erred when it failed to grant the defendant's pro se motion for dismissal but also when he failed to at the very least make an inquiry into the Governments case and determine why such a delay occurred and whether or not it caused prejudice to the defendant's ability to have a fair trial. The defendant filed this Motion after the trial but several weeks before the sentencing hearing because his attorney failed to file the motion. Most importantly the trial court never ascertained from either the defense or the prosecution as to whether or not such a delay had caused prejudice to the defendant's ability to have a fair trial. In denying the motion the trial judge failed to make any inquiry into why the delay occurred and refused to put the Government to the task of having to answer such a reasonable and necessary motion filed by the defendant. The court at the sentencing hearing simply stated to the defendant that his motion had been denied without any type of explanation being given to the defendant.

This court stated in United States v. Burns, 990 F.2d 1426, (4th Cir. 1993), "whether the Government has delayed in order to gain an advantage... it is a question of fact, and questions of fact are the trial court's special province. The Court of Appeals is therefore not free to disturb the district court's finding of fact unless they are clearly erroneous." The problem in this matter is that the trial judge did not set

forth in his Order why he denied the defendant's motion nor did he state on the record the reason for his denial of the Motion. The trial judge did not even require the Government to make any formal or informal response in writing or orally in court. The Government had had seven years to prepare for this trial and the defendant only had seventy days.

CONCLUSION

For the foregoing reason, the Petitioner respectfully requests that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 00-4531

ANTONE HENRY POINDEXTER,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
James C. Cacheris, Senior District Judge

Submitted: February 28, 2001

Decided: March 26, 2001

Before WILKINS, NIEMEYER and GREGORY, Circuit Judges

Affirmed by unpublished per curiam opinion.

COUNSEL

Carl C. Muzi, Richmond, Virginia for Appellant. Helen F. Fahey, United States Attorney, Stephen W. Miller, Assistant United States Attorney, Richmond, Virginia for Appellee.

Unpublished opinions are not binding precedent in this circuit. See
Local Rule 36(c).

OPINION

PER CURIAM:

A jury convicted Antone Henry Poindexter of conspiracy to acquire firearms through straw purchasers, four counts of possession of a firearm by a convicted felon, and four counts of making false statements to a firearms dealer. He appeals his convictions on the grounds that the district court erred in denying his motion to substitute counsel, that his due process rights were violated, and that counsel was ineffective. Finding no reversible error, we affirm.

Poindexter challenges his convictions, asserting that the district court erred in denying his motion to substitute counsel. Our review of the record leads us to conclude that the district court did not abuse it's discretion in denying the motion. *United States v. DeTemple*, 162 F.3d 279, 288 (4th Cir. 1998) (stating standard of review and discussing factors court must consider), *cert denied*, 526 U.S. 1137 (1999).

Next, Poindexter assert that pre-indictment delay significantly prejudiced his ability to have a fair trial, in violation of the Due Process Clause. However, Poindexter did not challenge the indictment on this ground before trial, and his failure to do so results in waiver of the issue on appeal. Fed. R. Crim. P. 12(b)(1). Poindexter never sought relief below for his default by showing cause, Fed. R. Crim. P. 12(f), and fails to establish plain error on appeal. *United States v. Lewis*, 235 F.3d 2154, 218 (4th Cir. 2000) (stating standard of review on appeal); *United States v. Automated Med. Labs. Inc.*, 770

F.2d 399, 403-04 (4th Cir. 1985) (providing standard for claims of pre-indictment delay).

Finally, Poindexter raises numerous claims of ineffective assistance of counsel. We decline to review these claims on direct appeal because Poindexter failed to show conclusively from the face of the record that counsel provided ineffective representation. *United States v. Richardson*, 195 F.3d 192, 198 (4th Cir. 1999) (providing standard and noting that ineffective assistance of counsel claims generally should be raised by motion under 28 U.S.C. Sect. 2255), *cert denied*, 528 U. S. 1096 (2000).

Accordingly, we affirm Poindexter's convictions. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES DISTRICT COURT
Eastern District of Virginia
Richmond Division

UNITED STATES OF AMERICA

V. Case Number 3:97CR00079 001

Antone Henry Poindexter,

Defendant,

JUDGMENT IN A CRIMINAL CASE

The defendant, Antone Henry Poindexter, was represented by Stanley W. Preston., Esquire.

The defendant was found guilty on count(s) 1, 2, 3, 4, 5, 6, 7, 8 and 9 after a pleas of not guilty. Accordingly, the defendant is adjudged guilty of the following count(s), involving the indicated offense(s):

Title & section	Nature of Offense	Date Offense Concluded	Count No.(s)
18 U.S.C. Sec. 922(a)(6) & 924(a)(1)(A)	Conspiracy	02/21/97	One
18 U.S.C. Sec. 922(g)(1) & 924	Possession of a Firearm by a Convicted Felon	12/4/93	Two through Five
18 U.S.C. Sec. 922(a)(6) & 2	False Statements to a Firearm Dealer	12/4/93	Six through nine.

As pronounced on July 10, 2000, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any name, residence or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Signed this ____ day of _____, _____.

_____

James C. Cacheris, United States District Judge

Defendant's SSN: 084-58-7650 USM# 35306-083
Defendant's Date of Birth: 08-04-67
Defendant's Mailing Address: 85 Union Street, Freeport, NY 11520
Defendant's Residence Address: Same

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was mailed this 25th day of June, to Stephen W. Miller, Ast. U.S. Attorney, 18th Floor, 600 East Main Street, Main Street Centre, Richmond, Va., 23219, and to the Solicitor General, Department of Justice, Room 5614, 10th Street and Constitution Ave., N.W., Washington, D.C., 20530.

_____

Carl C. Muzi